

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Orig & Affidavit of mailing

77-1099

To be argued by
BERNARD J. FRIED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1099

UNITED STATES OF AMERICA,

Appellee,

—against—

PHILIP W. ROSATI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
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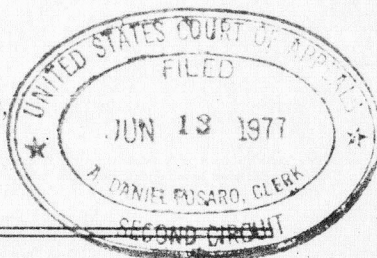


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Docket No. 77-1099

UNITED STATES OF AMERICA,

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PHILIP W. ROSATI,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Philip W. Rosati appeals from a judgment entered on February 18, 1977, in the United States District Court for the Eastern District of New York, (Neaher, J.) following a jury trial, convicting him of a three count indictment alleging conspiracy to import about two thousand grams of hashish oil, possession and importation of hashish oil, all in violation of 21 U.S.C. §§ 841(a)(1), 952(a) and 963. Appellant was sentenced pursuant to 18 U.S.C., § 5010(b), to run concurrently on each count. On March 18, 1977, as a result of his having been arrested on March 3, 1977 in Los Angeles for an unrelated offense, bail pending this appeal was revoked and appellant was ordered to begin serving his sentence. He is currently incarcerated.

Rosati, who does not challenge the sufficiency of the evidence, attacks the trial court's denial of his requested

charge on accomplice testimony, and claims that the court's charge on this matter was both inadequate and prejudicial to the defense. He also contests the admission of his passport into evidence.

Statement of Facts

On April 30, 1976, upon returning from India, appellant's co-defendant, Brad Colbert, was arrested at John F. Kennedy International Airport following a Customs inspection which revealed that Colbert was in possession of hashish oil (54). During the course of a subsequent search of Colbert's person and effects, government agents discovered items, such as hotel bills, bearing the name of the appellant, and ascertained that Colbert and the appellant were travelling companions (58-59, 368). Thereafter, appellant, who had taken a connecting flight from New York to Los Angeles, was arrested upon his arrival in Los Angeles (395).

Incident to his arrest, appellant's passport, ticket folder and four pieces of luggage were seized and searched (397-401). To avoid having to store the seized items, the agents in California asked appellant Rosati to telephone his mother, Mrs. Parcher, to claim the belongings. Appellant complied with this request (410). Two days after these items had been turned over to Mrs. Parcher, an agent of the Drug Enforcement Administration contacted Rosati's mother by telephone and asked her to return the passport and other items. The following day she delivered the passport and other papers to an Assistant United States Attorney in Los Angeles.¹

¹ Apparently, Mrs. Parcher, when she went to the United States Attorney's Office, was unable to carry the suitcases (Transcript of November 10, 1976, 14-18). In any event, the suitcases are not in issue here.

Colbert² testified that appellant had solicited and secured Colbert's services as courier in a scheme to import hashish from India and Pakistan. According to Colbert, the two travelled together to India and Pakistan where appellant arranged and concluded purchases of hashish oil. Because he had a "clean passport" (117), Colbert was entrusted with carrying the drugs into the United States, at which point he was arrested. Appellant had agreed to pay him \$5,000 for his participation (110).³ On cross-examination, Colbert was extensively examined concerning his cooperation and expected benefits.

No witnesses were called by the defense; and at the conclusion of the trial, the jury was instructed, in part, as follows concerning the testimony of an accomplice:

As you are aware the Government contends that through the testimony of the witness, Brad Colbert, it has, in addition to circumstantial evidence offered direct proof of conspiracy. Colbert is named in the indictment as one of the co-conspirators. By his own admission on the stand he must be regarded as a perpetrator of the offense charged against the defendant on trial.

An accomplice is one who wilfully associates himself with the commission of a crime. The law does not prohibit the use of accomplice testimony and whether you approve or disapprove of its use

² Prior to trial in this case, Brad Colbert, agreed to cooperate with the Government (94). On June 7, 1976 he pleaded guilty to Count 1 of the indictment, which charged conspiracy. Subsequently, the two remaining counts against him were dismissed.

³ The testimony of Colbert was corroborated in most respects by documentary evidence introduced. Moreover, there were additional witnesses who testified to the arrest of Colbert in possession of drugs. We deem it unnecessary to further detail the evidence adduced at trial since there is no claim of insufficiency.

should not enter into your consideration of the case. In certain types of cases the Government is, of necessity, frequently compelled to rely upon the testimony of an accomplice. Otherwise it would be difficult to detect or prosecute some wrongdoers and that is particularly true with conspiracy cases.

Often the Government has no choice in the matter. It must take witnesses to transactions as they are. There is no requirement in the Federal Court that the testimony of an accomplice be corroborated. A conviction may rest on the uncorroborated testimony of such a witness, if he is found credible and reliable. However, the testimony of such a witness should be viewed with great caution and scrutinized very carefully. Nevertheless, it does not follow, because a person has acted or been a participant in a crime or is an accomplice that he is not capable of giving a truthful version of what occurred. You should ask yourselves these questions:

Did Colbert give false testimony or color his testimony contrary to fact because he has not been prosecuted on the remaining charges in the indictment or because he believes that his cooperation may result in more lenient treatment. If you find his testimony was deliberately untruthful, you should unhesitatingly reject it. On the other hand, if upon a cautious and careful examination you are satisfied that he has given a truthful version of the essential events, beyond a reasonable doubt, there is no reason why you should not accept it.

ARGUMENT

POINT I

The Trial Court's Instructions On Accomplice Testimony Were Proper.

On this appeal, appellant recognizes that in the federal courts accomplice testimony need not be corroborated, *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Corallo*, 413 F.2d 1306, 1323 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), and that the instructions here, in this regard, were correct (Brief for Appellant, p. 12). However, appellant maintains that the court's charge was incorrect in that it called the jury's attention to the Government's need to call accomplice witnesses, but failed to adequately specify the conditions which might provoke an accomplice to lie. A view of the cases dealing with this issue, however, clearly shows that the District Court's instructions in this case were more than adequate to ensure close examination of the witness's testimony by the jury.

In this Circuit, language substantially identical to that used here has been consistently upheld as "fairly appris[ing] the jury of the pitfalls of relying upon an accomplice's testimony." *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976). See also *United States v. Tyers*, 487 F.2d 828, 831 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); *United States v. Projansky*, 465 F.2d 123, 136 n.25 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Falange*, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970); *United States v. Corallo*, 413 F.2d 1306, 1322 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States v. Vita*, 294 F.2d 524, 526 (2d Cir. 1961).

Appellant however, objects to the court's instruction concerning the Government's necessity for accomplice witnesses. This argument is frivolous since this Court has clearly held that a charge which explains that the Government must often call upon accomplice witnesses because of their sole access to certain information has been deemed perfectly proper. *United States v. Projan-sky*, *supra* at 136, n.25. Indeed, the general rule is that "[i]t is not error to inform the jury that the Government may, and sometimes must, rely on an accomplice's testimony to prove its case." *United States v. Curry*, 471 F.2d 419, 422 (5th Cir.), *cert. denied*, 411 U.S. 967 (1973). See also *United States v. Corallo*, *supra* at 1322. Therefore, that portion of the charge was correct.

Appellant further contends, in essence, that the court's cautionary instructions were inadequate to apprise the jury of its need to scrutinize the accomplice testimony. He maintains that more emphatic language, explaining the character deficiencies of felons and analyzing the reasons an accomplice may have for lying, was required. The weight of authority and the substance of the charge, however, indicate that his contention is without merit. The instructions on accomplice testimony adequately apprised the jury of its need to scrutinize, and there is no need for the judge to specifically instruct the jury that the testimony of accomplices who are confessed felons must be viewed with particular caution, *United States v. Dioguardi*, 492 F.2d 70, 82 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974), or to elaborate on any particular reason why accomplice testimony must be received with great care, *United States v. Garvis*, 523 F.2d 1177 (D.C. Cir. 1975). In addition, a judge is not required to instruct that the witness may be motivated by expected rewards, implicit or explicit, in return for his testimony. Although the possibility of such motivation permits a wide latitude for cross-examination of accomplice witnesses, it is not a mandated element of the accomplice instruction. *United*

States v. Mangano, 543 F.2d 431 (2d Cir. 1976); *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

In view of these principles, we contend that the court's instructions were more than adequate. Accordingly, there was no error, since the jury was correctly advised of its duty to scrutinize this testimony.

POINT II

The Passport Was Properly Admitted Into Evidence.

Appellant contends that the passport, which had been turned over to his mother by the arresting agents, was improperly returned by her to the Government. It appears to be his contention that she was without authority to return the passport and, therefore, could not lawfully consent to its return. But, according to appellant, even assuming that she possessed such authority, her consent was involuntarily obtained. Finally, he contends that there was a failure to comply with purportedly applicable Department of State regulations concerning the withdrawal of a passport. These contentions, we submit, are without merit.

Since, a passport "at all times remains the property of the United States and shall be returned to the Government upon demand", 22 C.F.R. § 51.9, the appellant himself could not have lawfully refused to turn over his passport "for use as evidence against him", *United States v. Falley*, 489 F.2d 33, 41 (2d Cir. 1973). Thus, the mother, likewise, had no authority in law to refuse to comply with a demand for this document. There is no question but that the passport was given to appellant's mother for safekeeping. Certainly, this transfer could give her no greater rights to the passport than her son would have had.

Even though we contend that the issue of consent is irrelevant, since the mother could not have refused to turn over the passport, *United States v. Falley, supra*, we submit that the passport was voluntarily returned to the Government by her. The mother, pursuant to a telephone call, simply brought the passport, together with the other documents which the agents had given to her, to the United States Attorney. It is hard to conceive of how this telephone request could have been considered coercive. Certainly, the surrender or return of this passport was, we submit, freely and voluntarily done. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The contention that 22 C.F.R. § 51.75, which requires written notification of the withdrawal of a passport by the Secretary of State and specified review procedures applicable when such action is taken (22 C.F.R. §§ 51.80-51.105), somehow should govern here is incorrect. The referenced regulations, by their terms, refer to action by the Secretary of State or his duly authorized representative. This is not our case. Here, the passport was requested by agents of the D.E.A., and not by an official of the State Department. Such demands are controlled by 22 C.F.R. § 51.9 which has no corresponding provision for review. See *United States v. Falley*, 489 F.2d *supra* at 41, n.4.

Accordingly, the passport was properly received into evidence by the District Court.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 9, 1977.

Respectfully submitted,

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BERNARD J. FRIED,
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*Assistant United States Attorneys,
Of Counsel.*⁺

⁺ The United States Attorney's Office wishes to express appreciation to Margaret Vaughan, a third-year student at the Fordham Law School, for her assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of June 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

LEGAL AID SOCIETY, 506 U. S. COURTHOUSE, FOLEY SQUARE,

NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Sworn to before me this

13th day of June 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979